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Supreme Court, U.S.
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No. 00-1197

In The

Supreme Court of the United States

October Term, 2000

M.S., on behalf of S.S., his minor child,

Petitioner,

– against –

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF YONKERS,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should review the determination below that petitioner failed to meet its burden of demonstrating the appropriateness of a private school placement under the Individuals with Disabilities Education Act.

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INTRODUCTION

Respondent Board of Education of the City School District of the City of Yonkers ("Board") requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit in this case. The official citation for the decision below is M.S. ex rel S.S. v. Board of Educ. of the City School Dist. of the City of Yonkers, 231 F.3d 96 (2d Cir. 2000).

COUNTERSTATEMENT

Procedural History

1. Administrative Hearings – Petitioner had instituted an impartial hearing under the Individuals With Disabilities Education Act ("IDEA") in 1998 seeking reimbursement from respondent for the cost of tuition for their son at a private school under the test set forth in this Court's decision in School Committee of Burlington v. Department of Education, 451 U.S. 359, 369-370 (1985).

New York State has a two-tiered system for administrative prosecution of due process complaints under the Individuals with Disabilities Education Act. At the first tier, the impartial hearing officer ("IHO") [the only decision maker in this case who took testimony and, accordingly, had the opportunity to evaluate the credibility of witnesses] denied tuition

reimbursement on two alternative grounds: that the Board was providing S.S. with an appropriate education; and that the program at the private school was inappropriate for the student's needs. Pet. Br., "50a."

On appeal, the New York State Education Department's State Review Officer ("SRO") found that though the Board's individualized education plan ("IEP") was inadequate, the education afforded at the private school was also inadequate. Id., "43a-44a." The SRO found, specifically, that:

- the parent had not demonstrated that his son's special education needs were addressed at the private school. Id., "46a";

- the student's reading level had not improved at the private school and his spelling level had, in fact, declined while in attendance there. Id, "45a";

- the parent had not demonstrated that the student's placement in the private school was consistent with IDEA's requirements that children with disabilities be placed in the least restrictive environment, since the student's management needs were not so severe as to warrant placement in the private school while, academically, he had been benefitting from the educational services provided in the public school setting. Id., "46a."

2. District Court – Upon the parent's appeal to the District Court [pursuant to 20 U.S.C. 1415(e)(2)] the case was decided upon a motion (and cross-motion) for summary judgment. Neither party requested a hearing from the District Court, and none was conducted.

The District Court concurred with the SRO's finding that respondent's IEP was inadequate (A287). Although it had conducted no hearing, that Court found the private school constituted "...an appropriate placement" based upon the record before the SRO. JA289. The District Court's Opinion did not articulate any specific factual finding made by either the IHO or SRO with which it found fault in deciding to reverse on this issue. Pet. Br., at "29a-32a." The District Court also rejected respondent's argument (which had been adopted by the SRO) that the private school was not the "least restrictive environment" for the student:

> ...given the patent inadequacy of an IEP that failed to document the full extent of S.S. learning disabilities and to provide clear goals, S.S. parents are entitled to tuition reimbursement for their unilateral placement of S.S. irrespective of his contention that the (private school) was not the least restrictive environment. As stated above, the test for parents' private placement is not perfection. In any event, although not abundantly clear from the record before this Court, given S.S. documented learning disabilities, the environment of the Stephen Gaynor School may well be the least restrictive environment necessary to provide S.S. with a meaningful education and not just trivial advancement.

Id., at "31a-32a."

3. The Second Circuit's Decision – Upon appeal by the Board, the Second Circuit reversed the District Court's award of tuition reimbursement. In its decision, the Second Circuit reviewed the language of this Court's decision in Board

of Educ. v. Rowley, 458 U.S. 176, 206 (1982) as well as its own decisions, which point out that:

> ...(W)hile federal courts do not simply rubber stamp administrative decisions, they are expected to give due weight to these proceedings, mindful that the judiciary generally lack(s) the specialized knowledge and experience necessary to resolve persistent and difficult questions of education policy...

Id, at "18a."

According "due weight" to the SRO's decision (as petitioner requested with regard to the administrative finding of an inadequate IEP), the Circuit Court declined to disturb the administrative finding as to the IEP's inappropriateness. That Court acknowledged, however, that the record did reflect the student was "making progress" in respondent's public school. Id, at "14a."

Turning to the issue of the appropriateness of the private school, the Second Circuit held that the SRO's finding as to the inappropriateness of the private school was supported by the administrative record and, therefore, found the parent was not entitled to tuition reimbursement under IDEA.

In so ruling, the Second Circuit specifically found that the District Court had neither afforded deference to the SRO on the issue of the appropriateness of the private school (Id, at "17a"), nor proffered any explanation as to why it had discredited the SRO's assessment of the objective evidence. Id. It found, accordingly, that the District Court:

> ...inappropriately substituted its own subjective

> judgment about what are appropriate measures for educational progress.

Id., at "18a." The Second Circuit also held that:

> ...(A)n assessment of educational progress is a type of judgment for which the district court should defer to the SRO's educational experience, particularly where, as was the case here, the district court's decision was based solely on the record that was before the SRO.

Id., at "18a."

After the Second Circuit reversed, petitioner neither moved for reargument nor rehearing en banc below. This Petition ensued.

REASONS FOR DENYING THE PETITION

The Petition should be denied, since:

(i) The conflict asserted to exist among the Circuits (as to what constitutes "due weight" for the purpose of judicial review of an impartial hearing under IDEA) will not present itself for review on this record, since:

(a) no rational construction of the Second Circuit's holding supports the conclusion that a district court judge is "bound" to follow an administrative decision made under IDEA;

(b) the District Court, in any event, accorded no weight whatsoever to the SRO's finding on the appropriateness of the private school, a result which would not be countenanced under any interpretation of Rowley's "due weight" requirement.

(ii) The argument that the party seeking to accord "due weight" to an administrative decision under IDEA has the burden of proving the administrative officer's qualifications was neither litigated below nor is it properly part of the record before the court.

(iii) The argument that the decision below leaves parents of disabled students without a remedy is meritless.

i. **The conflict asserted to exist among the Circuits will not present itself for review on the record before the Court** – Petitioner argues certiorari should issue to determine whether this Court's decision in Rowley "...binds a district court judge to the decision of the administrative review officer" on an issue regarding private school

placement. Petition, "Question Presented" at "i." See also, Id., at "19."

> ...it is contrary to the spirit of the IDEA, and this Court's holding in Rowley for a judge to completely abdicate his responsibility to review the record and evidence before him and to defer to the decision of the administrative authority.

Id, at "19."

Even if that were a question this Court was otherwise disposed to address, this case simply does not present that issue for review on the record presented.

(a) no rational construction of the Second Circuit's holding supports the conclusion that it "binds" a district court judge to an administrative decision made under IDEA

First, no rational construction of the Second Circuit's decision warrants the conclusion that such decision requires a reviewing court to either "abdicate" its responsibility to review an administrative decision or be "bound" by the decision on the issue of the appropriateness of a private school. Neither directly nor by implication does the Second Circuit hold that an administrative hearing officer's findings under IDEA are conclusive on the District Court. The Circuit Court's decision avoids blind obeisance to the SRO's ruling, and instead is grounded upon that court's independent conclusion that the SRO's findings were amply supported by the record:

> ...(G)iven the deference we owe to the SRO's

> conclusions regarding the formulation of educational programs, and our review of the record, we defer to and accept the SRO's supportable finding that the (private) school was an inappropriate placement for S.S.

Pet., "19a." (emphasis supplied).

The decision below turned upon a fact-based review of the administrative record in which the Court examined whether the SRO's finding regarding the appropriateness of the private school was sufficiently supported by that record and, therefore, entitled to deference. While petitioner obviously disagrees with the Circuit Court's decision that the SRO's finding was supported by the record, that disagreement provides no basis for this Court's intervention.

The decision is, therefore, squarely in line with settled law that, under this Court's decision in Rowley, "due weight" should be accorded the administrative decision makers.

The Second Circuit's related observation that the weight accorded a district court decision is less where such court itself did not itself conduct a hearing is also entirely in line with the decisions of other circuits on this issue. See e.g., Dale M. ex rel Alice M. v. Board of Education of Bradley-Bourbounnais High School District No. 307, 237 F.3d 813, (7th Cir. 2001) ["...(w)hen the court has before it evidence that was not before the hearing officers, the amount of deference due the reviewing officer declines, since the latter's decision was based on an incomplete record. But when there either is no new evidence or the judge for some reason doesn't consider it, he owes considerable deference to the reviewing officer"].

Accordingly, the issue for which review is sought is not raised by the decision below.

(b) Since the District Court failed to accord any weight whatsoever to the administrative decision on the appropriateness of the private school, that decision would not have withstood appellate scrutiny under any definition of "due weight"

Another reason why this case presents no reviewable issue on "due weight" is that the District Court Judge accorded no weight whatsoever to the SRO's decision on the inappropriateness of the private school. As the Second Circuit pointed out, the District Court in this case impermissibly "...substituted its own subjective judgment" for that of the IHO and SRO on appropriate indicia of educational progress in a private school. Petitioner's brief as much as concedes this point in apparently urging that the District Court Judge could, in fact, appropriately substitute his judgment for that of the SRO:

> ...(s)urely the district court judge was equally qualified (as the SRO) to consider the record before him.

Pet. Br., p. 21.

As Petitioner's Brief recognizes, however, all circuits interpret Rowley's "due weight" requirement as mandating that some deference be accorded the administrative decision maker. See, Pet. Br., pp. 13-17. See also, Teague v. Independent School Dist., 999 F.2d 127, 131 (5th Cir. 1993) [...the district court should give the hearing officer's findings 'due weight,' even though hearing officer's findings are not conclusive]; Lenn v. Portland S.D., 998 F.2d 1083 (1st Cir. 1993) [IDEA requires a more critical appraisal of the agency determination than clear-

error review entails, but it nevertheless falls well short of complete de novo review]; Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1997) [hearing officer's findings of fact are considered prima facie correct; court must explain reasons if not following findings]; Burilovich v. Board of Ed, 208 F.3d 560, 566 (6th Cir., 2000) [weight due administrative decisions will vary, depending on whether the Court is reviewing procedural matters and whether educational expertise is essential to the administrative findings]; Dale M., supra at 237 F.3d 813 (7th Cir. 2001) [when district judge bases his decision on review of the record, he must accord "due deference" to record; mere disagreement with administrative decision insufficient; court must be "strongly convinced" order is erroneous]; Fort Zumwalt School District v. Clynes, 119 F.3d 607, 610, cert. den. 523 U.S. 1137 (8th Cir. 1998) [level of deference to administrative decision less than required under substantial evidence test, but consideration should be given to state hearing panel's opportunity to observe demeanor of witnesses]; Adams v. Oregon, 195 F.3d 1141, 1145 (9th Cir., 1999) [increased deference should be accorded hearing officer where findings are thorough and complete].

As this review demonstrates, while the language of the various circuits on decisions addressing "due weight" may not be identical, the common threads running through these decisions are that:

- the District Court's review of the administrative record is something less than de novo;

- some deference must be accorded the administrative decision maker, which deference may vary according to the attendant circumstances, including whether the District Court heard additional testimony, and whether the administrative

decision was thorough and closely reasoned.

Therefore, while petitioner may argue that "...the outcome of an (IDEA) appeal will likely depend upon the circuit or court in which it was filed" (Pet. Br., pp. 13-14) it is respectfully submitted the outcome of this particular case would not vary, since this district judge accorded no deference whatsoever to the administrative findings, which is inconsistent with any interpretation of Rowley's "due weight" requirement. As the Second Circuit noted, an assessment of educational progress is exactly the type of determination that educational authorities are presumptively entitled to make. An assessment of educational progress in the public school setting is also, in fact, exactly what petitioner sought from both courts below. Petitioner's argument is that State educational authorities are equipped to measure educational progress in public school settings, but that expertise is extinguished when the locus of education is a private school. Nothing in Rowley or its progeny warrants such a conclusion, nor does petitioner provide any support in case law for that proposition.

As the District Court in the case sub judice simply substituted its judgment for the administrative decision maker on the private school issue, that holding would not have withstood appellate scrutiny in any of the Circuit Courts. This Court, therefore, need not reach the issue of the purported "split" among the Circuits on this record.

To the extent petitioner now (under this argument) seeks a uniform definition of "due weight" from this Court which can be inflexibly applied to every IDEA review by a court (regardless of the attendant circumstances), we respectfully submit that invitation should be declined by the Court. "Due" weight (much like "due" process) is, by definition, a concept not

susceptible of rigid and formulaic application. See e.g., Gilbert v. Homar, 520 U.S. 924, (1997) ["...(d)ue process is flexible and calls for such procedural protections as the particular situation demands."] As "due weight" will similarly and necessarily vary with the particular situation, codification of that standard is neither necessary nor appropriate.

ii. **The "misappprehension of fact" alleged is neither preserved for the record nor properly before the Court for review.** – While conceding Rowley's "due weight" requirement, petitioner also urges this Court to graft onto Rowley's holding an additional requirement – that deference should only be accorded an administrative decision where the party seeking such deference is able to "...allege and prove..." the relevant expertise of the decision maker:

> ...(A)ny party asserting that deference should be paid to any lower authority decision should, at the very least, be required to allege and prove the basis for that deference beyond the existence of a mere job title. A degree in education, time spent making, reviewing or implementing educational policy are relevant determinants of the value of the decision maker's opinion.

Pet. Br., pp. 21.

This argument is not properly before the Court and inappropriate for this Court's review for the following reasons:

- This question was neither raised nor litigated in the courts below, a consideration which militates against this Court exercising review, especially where petitioner himself sought deference accorded to one aspect of the SRO's decision below.

See e.g., California v. Taylor, 353 U.S. 553, 556, n. 2 (1957).

- Nothing in either the statute, legislative history, or case law is proffered in support of this proposition; which would require the District Court to jettison the statutory scheme under IDEA for resolution of due process disputes; relegate the parties to defense of the decision maker in each case; and require the courts to eschew an administrative decision which is carefully and closely reasoned in favor of one where the administrative officer has an acceptable pedigree;

- Petitioner's remarks about the qualifications of this particular SRO (Pet. Br., p. 21) are dehors the record;

- Petitioner's premise that the Second Circuit was laboring under a "misapprehension of fact" (Pet. Br., p. 21) does not warrant this Court's review under its Rule 10 (stating that a Petition for Writ of Certiorari is "...rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

(iii) **The argument that the decision below leaves parents of disabled students without a remedy is meritless** – Petitioner's final argument – that the Second Circuit's decision leaves parents confronted with an inadequate IEP without a remedy – does not warrant this Court's review. Parents can return to the CSE and request an appropriate IEP, or [once notice has been provided to the district; see 34 C.F.R. § 300.403(d)(6)(i) and (ii)] commence an impartial due process hearing seeking tuition reimbursement ; a change in placement; compensatory education or some other remedy. Under settled law, parents may, of course, obtain tuition reimbursement if (unlike the case sub judice) the private school is found to be appropriate.

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At the end of the day, the decision of the Second Circuit simply reiterates that while IDEA does not sanction inappropriate public placements, neither does it sanction inappropriate private placements. This holding is entirely consistent with this Court's teaching that:

> ...parents who...unilaterally change their child's placement during the pendency of review proceedings, without the consent of the state or local school officials do so at their own financial risk.

Florence County School District #14 v. Carter, 510 U.S. 7, (1993), citing, Burlington, at 471 U.S. 373-374.

Accordingly, the argument that the decision below deprives parents of an effective remedy under IDEA for an inadequate school district placement is without merit.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

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